

**BECKER, GLYNN, MUFFLY, CHASSIN & HOSINSKI LLP**

*Attorneys for Defendants*

299 Park Avenue, 16<sup>th</sup> Floor

New York, New York 10171

Telephone: 212-888-3033

Facsimile: 212-888-0255

Chester B. Salomon

csalomon@beckerglynn.com

Alec P. Ostrow

aostrow@beckerglynn.com

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

----- X  
SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

Adv. Pro. No. 08-01789 (BRL)

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

SIPA LIQUIDATION

(Substantively Consolidated)

Defendant.  
----- X

In re:

BERNARD L. MADOFF,

Case No. 09-11893 (BRL)

Debtor.  
-----X

IRVING H. PICARD, Trustee for the Liquidation  
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

Adv. P. No.  
10-04435 (BRL)

v.

PROSPECT CAPITAL PARTNERS,  
PROSPECT HILL FOUNDATION AND  
THE SPERRY FUND,

Defendant.  
-----X

**DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT  
OF MOTION TO DISMISS COMPLAINT**

**Preliminary Statement**

Prospect Capital Partners, Prospect Hill Foundation and The Sperry Fund (the “Defendants”), by their undersigned attorneys, respectfully submit this memorandum of law in support of their motion to dismiss the Complaint filed by Irving H. Picard (the “Plaintiff” or “Trustee”), as Trustee for the liquidation of Bernard L. Madoff Investment Securities, LLC (“BLMIS,” “Madoff” or the “Debtor”).

**Statement of the Current Posture of the Case**

Nearly three years have passed since the Defendants submitted their motion to dismiss the Complaint. In the interim, among other things, Judge Rakoff withdrew the reference, held consolidated hearings, and issued several decisions that apply in this adversary proceeding. Most significantly, Judge Rakoff decided that 11 U.S.C. § 546(e) bars all of the Trustee’s avoiding power claims asserted in the Complaint other than actual fraudulent transfers under 11 U.S.C. § 548(a)(1)(A). *Securities Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 476 B.R. 715, 722 (S.D.N.Y. 2012), *appeal pending*, No. 12-2557(L) (2d Cir.). The result is that Counts Two through Six of the Complaint have been dismissed. Unless the Second Circuit reverses, the only remaining claims in the Complaint are Counts One (actual fraudulent transfers under the Bankruptcy Code) and Seven (subsequent transferee liability).

On March 10, 2014, the Trustee and the Securities Investor Protection Corporation (“SIPC”) filed memoranda of law in opposition to various motions to dismiss, including the one made by the Defendants herein. These filing were omnibus submissions, identically filed in several adversary proceedings, including the instant one. Many of the arguments address points that the Defendants herein did not raise. One

argument addressing a point that the Defendants did make – that to plead an actual fraudulent transfer claim under New York law, fraudulent intent of the transferee must also be alleged – is moot in light of Judge Rakoff’s ruling concerning the applicability of section 546(e). This argument pertains to Count Three of the Complaint, which has been dismissed.

Since the Defendants have not sought dismissal of Count One (actual fraudulent transfer under the Bankruptcy Code), there are no remaining live issues under the Defendants’ motion to dismiss.

### **Conclusion**

For all the foregoing reasons, the Defendants respectfully requests that the Complaint be dismissed, and in particular that Counts Two, Three, Four, Five and Six be dismissed with prejudice, and that the Defendants be granted such other and further relief as is just.

Dated: New York, New York  
March 17, 2014

Respectfully submitted,

**BECKER, GLYNN, MUFFLY, CHASSIN &  
HOSINSKI LLP**

*Attorneys for Defendants*

By: /s/ Alec P. Ostrow

Alec P. Ostrow  
Chester B. Salomon  
299 Park Avenue  
New York, New York 10171  
Telephone: (212) 888-3033  
Facsimile: (212) 888-0255  
aostrow@beckerglynn.com  
csalomon@beckerglynn.com